

WILLIAM M. HARTNESS,  
Appellant,

**OFFICE OF PERSONNEL MANAGEMENT,  
Agency.**

APR 4 1966

**DATE:** \_\_\_\_\_

Herbert E. Ellingwood, Chairman  
Maria L. Johnson, Vice Chair  
Dennis M. Devaney, Member

The agency has petitioned for review of the October 15, 1985 initial decision modifying the agency reconsideration decision to find that appellant has been overpaid retirement benefits in the amount of \$5,675.00, instead of \$6,465.00. For the reasons set forth below, the petition is hereby GRANTED, the initial decision is REVERSED, and the agency reconsideration decision that it has overpaid appellant retirement benefits in the amount of \$6,465.00 is SUSTAINED.

Appellant retired in 1978 and began receiving a Civil Service retirement annuity based on 29 years of civilian and military service, including military service served after December 31, 1956. On July 1, 1982, appellant reached the age of 62 years, thereby also becoming eligible for monthly old-age or survivor's (OASI) benefits under the Social Security

Act. By notice of September 24, 1984, the agency advised appellant that due to the delay in adjusting his Civil Service retirement annuity for post-1956 military service as required by Public Law 97-253, he was overpaid benefits from July 7, 1982, until October 1, 1984, totalling \$6,465.00. See Agency File, Tab 2. In its reconsideration decision, the agency rejected appellant's contention that since he was paid a total of \$5,605.00 in OASI benefits, the agency could not have overpaid him benefits greater than that amount. See Agency File, Tabs 3,4

On appeal to the Board's Atlanta Regional Office, the presiding official found that the agency had not "indicated", how it had arrived at its figures, except for its final figure of \$6,465.00. Further finding that this figure differed from that of \$6,282.00 in a computer print-out in the record, he then determined that the agency had not established the amount of overpayment by preponderant evidence. However, finding that appellant's submission as to the amount of OASI benefits received showed an overpayment in the amount of \$5,675.00, he modified the agency reconsideration decision by reducing the amount to that sum.

#### ANALYSIS

In its petition for review, the agency contends that the presiding official erred in basing the amount of overpayment on the amount of OASI benefits actually received by appellant in violation of the statutory provisions. We agree.

The presiding official erred in determining the amount of overpayment based on the amount of OASI benefits received.

Under 5 U.S.C. 8332(j)(1) credit for active military service performed after December 31, 1956, cannot be used to compute annuity benefits if the annuitant is entitled, or would be entitled upon application, to OASI benefits. Retirement benefits are reduced by that portion of the retirement annuity

that would be purchased by the post-1956 military service. Id. Effective October 1, 1982, Section 307 of Public Law 97-253 amended this provision to allow for an alternate reduction amount in the case of annuitants who retired before September 9, 1982. This alternate amount is equal to the amount of the OASI benefits which the Social Security Administration finds to be attributable to the post-1956 military service based on a statutory formula. As the agency contends, it is the method that results in the smaller reduction amount that is used to compute the new retirement annuity rate. See Section 307 of Public Law 97-253, codified as a note to 5 U.S.C. 8332.

The agency established the overpayment amount by preponderant evidence.

Finding the alternate reduction amount applicable to appellant, the agency determined that "[b]ased on information furnished by the Social Security Administration," the alternate reduction amount would provide appellant the higher benefit. See Agency File, Tab 4. The presiding official erred in finding that the agency determined that the alternate reduction amount was inapplicable in appellant's case because it would not benefit him. The agency submission in support of its action shows that it adjusted appellant's monthly annuity amount as of the effective date of Public Law 97-253, based on information that appellant was entitled to OASI benefits of \$185.00 per month. See Agency File, Tab 4. However, the agency submission also indicates that before this date appellant's monthly annuity amount was adjusted as required by Section 8332(j)(1) by reducing that portion based on post-1956 military service. Id. The agency submission also indicates the actual amounts that appellant received for the relevant time period. Id. Accordingly, we find that since the accuracy of these figures has not been challenged by appellant, they are sufficient to provide an evidentiary basis

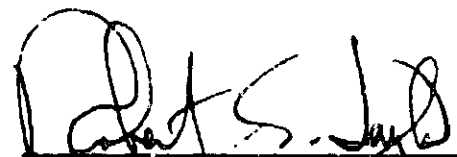
upon which the Board can determine that the agency has correctly determined the overpayment amount. See *Kerr v. Office of Personnel Management*, 29 M.S.P.R. 284, 286 (1985) (evidence of Social Security information and statutory formula are sufficient to provide evidentiary basis, despite agency's failure to include actual mathematical computations). We therefore find that the agency has established the overpayment amount by preponderant evidence, thereby satisfying its burden of proof.

#### NOTICE

This is the final Order of the Merit Systems Protection Board in this appeal. 5 U.S.C. 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.